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No. 83-

In The

Supreme Court of The United States

October Term, 1983

THE FORMALDEHYDE INSTITUTE, INC. and BORDEN, INC.,

Petitioners,

v.

ALFRED L. FRECHETTE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI

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August 29, 1983

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QUESTIONS PRESENTED

1. Whether, under the Due Process Clause of the Fourteenth Amendment, a state statute may be applied by a state administrative agency to ban a product and to impose retroactively automatic and onerous remedial obligations for past lawful sales without ever providing an adjudicatory hearing.

2. Whether, under the Due Process Clause of the Fourteenth Amendment, a state administrative agency may ban a product as hazardous and order its repurchase at great expense without having a rational basis for finding that the product may cause any actual harm.

PARTIES BELOW

The parties to the appeal below were:

Appellant: Massachusetts Commissioner of Public Health

Appellees: Berkshire Gas Company
Borden, Inc.
C.P. Chemical Company, Inc.
The Formaldehyde Institute, Inc.

STATEMENT REQUIRED BY RULE 28.1

In addition to wholly-owned subsidiaries, petitioner Borden, Inc. has the following subsidiaries and affiliates:

Alba Nordeste S.A. Industrias Quimicas
Borden Chemical Malaysia
Borden Chile Limitada
Borden France S.A.
Borden International Packaging Ltd.
Borden International Philippines
Bordex Nederland B.V.
Broex S.A.
Clover Brand Dairies, Inc.
Compania Casco S.A.I.C.
Compania Quimica Borden S.A.
Crecspan S.A.
Demer S.A.
Estudios Marketing Internacional S.A.
Estudios Y Servicios Tecnicos Empresariales S.A.
Feslente Boniface S.A.
Gallina Blanca S.A.
Galloway-West Co., Inc.
Grand Bahama Dairy Products Ltd.
Hitachi Borden Chemical Products, Inc.
Hong Kong Snack Food Company Limited
John Robt. Powers Attractions, Inc.
Kerry Cheese-Tek Limited
Klemme GmbH & Co. K.G.
Korea Borden Chusik Hoesa
Lactaria Costarricense S.A.
Las Amigas del Pueblo S.A.
Latin America Agribusiness Development Corp.
Materiales Moldeables S.A. de C.V.
Meiji Borden
Monochem, Inc.
Nassau Dairy Products Ltd.
Naturin S.A.
Preparados Alimenticios S.A.
Productos Donita, Inc.
Productos Quimicos Y Alimenticios
Quimica Borden Ecutoriana
Quimica Borden S.A. de C.V.
The Viking Engraving Corp.
Thompack B.V.
TRL S.A.
Trinidad Processing Company Ltd.

Petitioner The Formaldehyde Institute, Inc. is a trade association. The following persons are members of The Formaldehyde Institute, Inc.:

Acme Resin Corporation
Adhesives & Sealant Council
American Apparel Manufacturers Association
American Cyanamid Company
American Paper Institute
American Plywood Association
American Textile Institute
Ashland Chemical Company
BASF-Wyandotte Corporation
Bohemia, Inc.
Boise-Cascade Corporation
Borden, Inc.
Burlington Industries
Celanese Corporation
Celotex Corp.
Champion International Corporation
Collins Pine Company
Dan River, Inc.
E.I. du Pont de Nemours & Co.
Embalmers Supply Company
Georgia-Pacific Corporation
Getty Oil Company
Hardwood Plywood Manufacturers Association
ICI Australia Operations Pty. Ltd.
Inda-Association of the Nonwoven Fabrics Industry
International Minerals & Chemical Corporation
Koppers Company, Inc.
Levi Strauss & Company
Liberty Homes, Inc.
M. Lowenstein Corp.
Man-Made Fiber Producers Association
Manufactured Housing Institute
Masonite Corporation
Medford Corporation
Milliken Research Corporation
Monsanto Plastics & Resins Company
National Cotton Council of America
National Forest Products Association
National Particleboard Association
Occidental Chemical Corporation
Perstorp, Inc.
Plastics Engineering Company
Plastics Manufacturing Company
Plum Creek Lumber Company
Ponderosa Products, Inc.
Potlatch Corporation
Proctor Chemical Company, Inc.
Pyneboard Pty. Ltd.
Ralph Wilson Plastics Company
Recreation Vehicle Industry Association
Reichhold Chemicals, Inc.
Schult Homes Corporation
Sun Chemical Corporation
The Carpet and Rug Institute
The Dodge Chemical Company
The Society of Plastics Industry
Union Camp Corporation
West Point Pepperell
Western Manufactured Housing Institute
Weyerhaeuser Company
Willamette Industries, Inc.
Wright Chemical Corporation

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**The Appendix to the Petition for a Writ of Certiorari has been separately bound, pursuant to Rule 36. The several appendices contained therein will be cited as A 1* et seq., *B 1* et seq. *and so forth.*

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OPINIONS BELOW

The opinion of the Massachusetts Supreme Judicial Court (A 1) is reported at 388 Mass. 707, 448 N.E.2d 367 (1983). The order of the Supreme Judicial Court denying the petition for rehearing (B 1) and the opinion of the Superior Court (C 1) are unreported.

JURISDICTION

The decision of the Massachusetts Supreme Judicial Court was entered on April 12, 1983. A timely petition for rehearing was denied on June 1, 1983. B 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV: ". . . [N]or shall any State deprive any person of life, liberty, or property without due process of law . . . ."

Pertinent provisions of the Massachusetts Hazardous Substances Labelling Act, MASS. ANN. LAWS ch. 94B, § 1 *et seq.*, (Law. Co-op. 1975), and of the relevant state regulations are reproduced in the Appendix. D 1-4, E 1-45.

STATEMENT OF THE CASE

This petition is brought to obtain review of a decision of the Supreme Judicial Court of Massachusetts. That decision sustained the constitutionality of an administrative proceeding conducted by the Massachusetts Department of Public Health ("the Department"). In a non-adjudicatory proceeding, the Department reviewed the potential hazard of the insulating material, urea-formaldehyde foam insulation ("UFFI").[1] The Department subsequently banned UFFI and required the product to be repurchased (removed) from houses into which it had been installed.[2]

Petitioners[3] requested but were denied an adjudicatory hearing before the Department. Petitioners were not permitted to cross-examine witnesses against them, to fully present evidence on their

[1]UFFI has been used extensively as an insulating material for buildings in Europe since at least 1958. Its use in this country developed after the Arab oil embargo in 1974, and it has since been used to insulate some 400,000 homes. UFFI has been found an attractive insulator because it can be injected into walls of existing structures, and thus is well suited for retrofitting older buildings. A 6.

[2]Under the repurchase regulations, ultimate responsibility for the costs of removal rests with the manufacturer of the components of the foam insulation. Any installer or distributor which pays the costs of removal may demand reimbursement for such costs from the manufacturer of the chemical components. E 42-43.

[3]Petitioner Borden, Inc. manufactured the components of a urea-formaldehyde foam insulation marketed under the tradename Insulspray. Borden Inc. sold the components to distributors who in turn sold them to installers. The installers prepared UFFI at the job site by mixing a liquid resin, a foaming agent, and compressed air. The resulting foam was injected into the walls of the building being insulated, where it solidifies. A 6-7.

(Footnote continued on next page.)

behalf or even to determine the reliability of "facts" relied upon by the Department in rendering its decision. In addition, the Department failed to advise petitioners of its position that the burden rested with them to prove that the product was not hazardous, rather than with the Department to prove that the product was hazardous.

Moreover, the Department had no factual basis for concluding that formaldehyde—a substance found in all human environments—was "hazardous" regardless of level of exposure or that UFFI emitted formaldehyde in amounts that presented an imminent danger to the public health. Virtually all chemical substances in commerce may cause some adverse effect at some level in some individuals. If the Department acted properly here, a State could ban virtually any substance without relation to actual harm, or more scientifically, to a level of exposure that is likely to produce a significant risk of injury. The Massachusetts ban and repurchase regulations are operative *regardless* whether any formaldehyde is released from UFFI and *regardless* whether any that is released has any perceptible effect upon human health or comfort.

For these reasons, the Department's action in banning UFFI and requiring its repurchase (removal from houses) was irrational and deprived petitioners of property without due process of law.[4]

(Footnote continued from previous page.)

Petitioner The Formaldehyde Institute, Inc. is an association whose members represent all phases of the formaldehyde industry. Its business members include manufacturers and distributors of formaldehyde; manufacturers and distributors of resins and adhesives containing formaldehyde; and industrial users who manufacture and distribute a wide variety of products utilizing formaldehyde.

[4]The Department's decision to ban UFFI based on its lack of knowledge about formaldehyde is dramatically at odds with the actions of four federal agencies—the Environmental Protection Agency (no action, under section 4(f) of the Toxic Substances Control Act, 15 U.S.C. §2601 *et seq.*, necessary because "there is no significant risk of serious or

(Footnote continued on next page.)

1. Administrative Proceedings

The Massachusetts Department of Public Health began an investigation of the alleged hazards of UFFI in the summer of 1978. The concern that led to the Department's investigation was the allegation that the insulation emitted formaldehyde.[5] The Department first concluded that formaldehyde (from all sources) at concentrations below 0.1 parts per million did not cause problems and probably did not cause problems at concentrations below 0.5

(Footnote continued from previous page.)
widespread harm to human beings" from formaldehyde, February 10, 1982), the Occupational Safety and Health Administration (denied a petition for an emergency temporary workplace standard to lower the current 3 ppm limit for formaldehyde, February 3, 1982), the Food and Drug Administration ("no regulatory action against the use of formaldehyde . . . is necessary at this time to protect the public health," Talk Paper—Formaldehyde, June 17, 1982), and the Department of Housing and Urban Development (.4 ppm level for formaldehyde in manufactured housing would provide "reasonable protection to manufactured home occupants," 48 Fed. Reg. at 37137, August 16, 1983); and with the decision of the Fifth Circuit in Gulf South Insulation v. CPSC, 701 F.2d 1137 (CA 5), reh'g denied, No. 82-4218 (June 23, 1983), striking down the CPSC's ban of UFFI. The court of appeals found that there was no credible evidence to support a conclusion that there is a health risk at the level of formaldehyde shown to exist in UFFI houses. *See* pages 18, 21, *infra*. Mandate in the case was issued on August 25, 1983. The CPSC has announced that it will not seek a writ of certiorari from this Court. The New York Times, August 26, 1983, page A1.

[5]Formaldehyde is a colorless gas consisting of carbon, hydrogen, and oxygen that is present naturally throughout the human body and in the atmosphere. It is a by-product of human metabolism and does not accumulate in the body. It is released continuously into the atmosphere through the photosynthesis of plant life and is present in such foods as potatoes, cabbage, and apples. Formaldehyde has been used commercially for more than 80 years, and over eight billion pounds are produced annually in this country for incorporation into such products as plywood, plastics, fertilizers, clothing, cleansers, paper, film, glues, preservatives, cosmetics, and deodorants. Its chief source in the ambient air is from the incomplete combustion of hydrocarbons. It is found in the emissions from industrial sources and houses that burn hydrocarbon fuels, as well as from automobiles, tobacco smoking, gas stoves and even heating of cooking oils. A 5-6.

ppm. C 7. The Department subsequently reversed itself and concluded that UFFI and formaldehyde at any level were dangerous. C 10, 17.[6]

On February 22, 1979, the Commissioner of the Department of Public Health ("the Commissioner") announced that hearings would be held in late March on a proposed ban of UFFI.[7] A 7. The Commissioner's stated purpose in holding hearings was not to determine whether UFFI was a hazardous substance, but rather to provide "an excellent forum to discover the wide spread health effects of [UFFI]." C 8. Prior to the commencement of the hearings, petitioners and others objected to the procedures outlined in the notice and requested but were denied an adjudicatory hearing. A 7-8.

Hearings were held on March 29 and 30, 1979. The case for the proponents of the ban was presented by the Secretary of the Executive Office of Consumer Affairs who offered and introduced the proponents' unsworn testimony. C 9-10. Petitioners were denied advance notice of the identity of these witnesses and were denied any opportunity to discover what these witnesses would

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[6]The trial court found that formaldehyde "is omni-present." C 2. In most indoor environments, formaldehyde levels of 0.05 to 0.2 parts per million are not uncommon. Formaldehyde has been measured at levels ranging from .005 to .008 in rural ambient air, to levels ranging up to .2 parts per million in urban outdoor air. C 3.

[7]The Commissioner purported to act pursuant to Massachusetts Hazardous Substances Labelling Act, MASS. ANN. LAWS ch. 94B, (Law. Co-op. 1975). D 1-4. The Commissioner is authorized to declare, "by reasonable rules and regulations," a substance to be hazardous which he finds is "toxic, corrosive, an irritant . . . if such substance or mixture of substances may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use. . . ." *Id.* §§1, 2(a), D 1-2. The statute also provides that "if the commissioner finds that [a hazardous] article . . . presents an imminent danger to the public health and safety, he may declare the article to be a banned hazardous substance and require its removal from commerce." *Id.* §2(d). D 3.

say and the basis of their statements. C 9. Petitioners were not allowed to cross-examine any witnesses or even to review certain complaint files used to attempt to impeach the veracity of some industry witnesses. C 9-10. Under these circumstances, the fact that petitioners were permitted to make a limited presentation could not cure the basic unfairness of the Department's actions, because there was no way for petitioners to anticipate or rebut statements purporting to present facts in support of the ban.

On November 1, 1979, the Department issued regulations declaring formaldehyde and UFFI to be toxic and hazardous substances in any quantity, banning the sale of UFFI, and requiring its repurchase (removal) from houses into which it had been installed.[8] E 1-45. These actions were predicated on the industry's alleged failure to sustain its previously unannounced burden of proving that there is a "safe" level of exposure to formaldehyde. C 10-11, 12.

After the present lawsuit was commenced, the Department stayed the repurchase regulations and further hearings were held on December 1, 1979, and August 1, 1980, to consider the repurchase provisions. Petitioners' motions for an adjudicatory hearing were again denied. No transcription of these proceedings was preserved. A 8, C 12. New repurchase regulations were issued on November 6, 1980. A 8. The revised regulations provided for an informal procedure whereby referees would review a written request for repurchase. The review is limited to whether the consumer owned a UFFI insulated building, whether the consumer reported the occurrence of certain health symptoms, and whether the named supplier furnished the UFFI for that building. The referees were not to determine the level, if any, of formaldehyde in the home, the source of any formaldehyde, or whether

[8]The trial court found that the "average cost" of repurchase pursuant to the regulations is between $12,000 and $14,000. In larger homes, the cost of repurchase would be as high as $25,000. A 31.

the health symptoms were caused by formaldehyde or UFFI.[9] Indeed, the referees were prohibited from accepting evidence on, or even considering, these issues. E 30-35, C 19.

2. Trial Court Proceedings

Petitioners brought declaratory judgment actions challenging the ban and repurchase regulations in the Superior Court of Suffolk County in November 1979. These suits were consolidated with three other cases and tried in September and October of 1981. The trial court issued its decision on January 18, 1982, striking down the regulations as arbitrary and capricious. C 16-20. The court also held that the Department was required to hold adjudicatory hearings prior to issuing the regulations. C 14, 20.

The trial court found the record devoid of any evidence that could rationally support the Department's action. The court catalogued the astonishing gaps in the record that left the Commissioner's regulations grounded only in "unsupported supposition." C 18. The Commissioner conceded that he did not know how many homes in Massachusetts were insulated with UFFI, A 27, what amount of formaldehyde was released into homes by UFFI, A 27, C 12, 17, or whether the level of formaldehyde present in homes insulated with UFFI differed materially from that in other homes. A 27, C 11, 17. The Commissioner acted "without any knowledge" whether the incidence of health symptoms among

[9]Under the revised regulations the consumer requesting repurchase need state only that he or another occupant has suffered "adverse health symptoms" after exposure to UFFI. The consumer need not allege, let alone prove, that UFFI caused such symptoms. E 26. If a named supplier requests review of the repurchase request, a physician's report is to be submitted which describes the occupant's "relevant medical history," lists the symptoms, *if any*, and states a diagnosis, *if any*. The physician need not be a treating doctor, need not make any diagnosis, and need not state that, in his opinion, the symptoms were caused by formaldehyde generally, let alone formaldehyde emitted from UFFI. E 30. (emphasis supplied).

persons living in UFFI insulated homes was higher or lower than among the general population or even what the incidence of these alleged symptoms was among persons in UFFI homes. C 6, 17-18.[10] Indeed, the evidence regarding the incidence of symptoms, introduced at trial, indicated that individuals living in homes insulated with UFFI experienced fewer health complaints than other persons. C 6. In light of these deficiencies, the trial court concluded that the Commissioner's actions in banning UFFI had been "rooted in ignorance, leaving important issues of causal connection and contribution and incident rates unanswered and, indeed, even unexplored" and were for that reason "irresponsible and totally arbitrary." C 17.[11]

3. The Decision of the Massachusetts Supreme Judicial Court

The Massachusetts Supreme Judicial Court granted direct appeals from the judgment of the trial court and reversed. The court first concluded that petitioners were not entitled either by state law or the Federal Constitution to an adjudicatory hearing prior to the issuance of the regulations. In the court's view, an adjudicatory hearing was required only where the State is determining the "legal rights, duties or privileges of *specifically named persons*." A 13 (emphasis supplied). Because petitioners had not been

[10]The trial court found that the Commissioner "could have caused an epidemiological study to have been [done] . . . but he elected not to compare the alleged health effects experienced by UFFI residents with the incidence rates for the general public." C 6.

[11]The trial court also concluded that the Commissioner had prejudged the issue whether UFFI is hazardous, based on a number of public statements made by the Commissioner prior to the hearings. C 7-8. The court further found that the Commissioner had unexpectedly shifted the burden of proof in the proceeding to petitioners and the industry without notice until after the regulations were issued. C 10, 12. The Supreme Judicial Court dismissed these findings as irrelevant in light of that court's conclusion that petitioners were not entitled to an adjudicatory hearing. A 28.

specifically named as parties in the administrative proceeding, the court concluded no hearing was required. A 13.

With respect to the repurchase obligation, the court held that the Federal and State Constitutions do require a hearing before repurchase could be ordered, because a request by a consumer that a specific supplier repurchase UFFI would affect the rights and duties of specifically named persons. A 14. The court, however, limited the hearing to a single issue—whether a named supplier in fact furnished the UFFI whose repurchase is sought. A 15-16. Because the court construed the statute to mandate repurchase once a product was banned, it reasoned that a hearing with respect to any issue other than the identity of the seller would be "gratuitous." A 16.

With respect to the substance of the regulations, the court ruled that the petitioners had failed to prove that "the commissioner lacked any conceivable, rational basis for the regulations." A 17. The court recognized that the Commissioner did not know the amount of formaldehyde that UFFI contributed to the indoor environment, did not know how the levels of formaldehyde in UFFI houses compared with non-UFFI houses or how many people had been affected, and had not caused epidemiological studies to be made. A 27. The court, nonetheless, perceived a "conceivable" basis on which the Commissioner could find that UFFI would "*potentially in some conditions* emit formaldehyde" at levels affecting the most susceptible persons in the population. A 25, 28. (emphasis supplied). Finally, the court rejected petitioners' objection that the repurchase obligations were arbitrary insofar as they prevented petitioners from establishing that UFFI had not emitted formaldehyde in a house or that no occupant of a house had been affected. The court restated its conclusion that the ban itself foreclosed these issues inasmuch as the petitioners' unqualified obligation to repurchase was established by statute once the product was banned. A 28-29.

REASONS FOR GRANTING THE WRIT

Without according petitioners the minimal procedural safeguards to protect their property rights as required by the Constitution, the State of Massachusetts retroactively imposed upon petitioners severe remedial obligations for past lawful sales of a useful product. As a direct consequence of the Department's failure to provide an adjudicatory hearing, there was a total failure to develop a valid factual basis to support the ban and repurchase regulations. This failure rendered the State's action irrational and deprived petitioners of property without due process of law.

The decision of the Massachusetts Supreme Judicial Court sustaining the Department's action under these circumstances is contrary to the decisions of this Court and of the courts of appeals, and should be reversed.

I. The Decision of the Massachusetts Supreme Judicial Court that Petitioners Were Not Entitled to an Adjudicatory Hearing Is Contrary to the Decisions of This Court and of the Courts of Appeals.

In plainest terms, Massachusetts has imposed upon petitioners an unexpected and onerous retroactive liability for past lawful conduct. As applied, the regulations require petitioners to expend substantial sums to repurchase and remove from existing buildings a product that is alleged to be hazardous. This determination was made without ever affording an adjudicatory hearing to determine if the product creates any hazard whatever. The Constitution does not permit property to be so destroyed or taken without the procedural safeguards that were denied petitioners.

The requirement that UFFI be repurchased and removed from buildings at considerable expense obviously deprives petitioners of property protected by the Constitution. Petitioners' common law property interests were expressly expanded, moreover, by the substantive protections provided by the state statute under which

the Commissioner purported to act in this case. Chapter 94B of the General Laws of Massachusetts provides, in part, that substances may be banned as hazardous only if it is determined that they "may cause substantial personal injury or substantial illness" as a result of their foreseeable use. MASS. ANN. LAWS ch. 94B, §1 (Law. Co-op. 1975). Numerous decisions of this Court establish that private expectations grounded in state law, which cannot be terminated except for "cause," create property or liberty interests to which the guarantee of procedural due process applies. *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Vitek* v. *Jones*, 445 U.S. 480, 487-490 (1980); *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1, 11-12 (1978); *Board of Regents* v. *Roth*, 408 U.S. 564, 576-578 (1972); *see also Arnett* v. *Kennedy*, 416 U.S. 134, 165-166 (1974) (Powell, J., concurring in part).

Because Massachusetts has deprived petitioners of property, the Fourteenth Amendment obliged the State to afford them "an opportunity . . . granted at a meaningful time and in a meaningful manner," *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965), "for [a] hearing appropriate to the nature of the case." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). It is equally plain that petitioners' procedural rights could not be defeated by the mere formalism advanced by the Massachusetts Supreme Judicial Court, that petitioners were not specifically named as parties to the administrative proceeding, and thus were entitled only to the lesser process accorded in this case. "[B]ecause 'minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions of adverse official action.' " *Logan* v. *Zimmerman Brush Co.*, *supra*, 455 U.S. at 432, quoting *Vitek* v. *Jones*, *supra*, 445 U.S. at 491.

Measured against the constitutional standard, it is apparent that petitioners were denied due process. This Court has held that

the determination of the requirements of due process in a given case depends upon the consideration of three distinct factors—the nature of the private interest affected by the official action; the value of specific procedures in safeguarding the private interest against erroneous or arbitrary deprivation; and the government's interest in administrative efficiency. *Mathews* v. *Eldridge*, 424 U.S. 319, 334-335 (1976); *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 895 (1961).

Here, there is no question that the ban and repurchase regulations directly and adversely impacted on the private rights of petitioners. Likewise, the right of cross-examination was critical since its use in the trial below provided the basis for upsetting the ban and repurchase regulations. Moreover, governmental efficiency would not have been impaired by providing an adjudicatory hearing due to the limited number of component manufacturers—those firms ultimately responsible under the repurchase provisions. Thus had the Massachusetts court undertaken the inquiry required by this Court's decisions, it would have found that each of the relevant considerations indicates that an adjudicatory hearing was mandated.

A. The Determination of Individualized and Onerous Obligations in This Case Required an Adjudicatory Hearing.

The Commissioner's ban and repurchase regulations have imposed onerous retroactive liability on petitioners. Estimates of the cost of removing UFFI from an existing home range from $12,000 to more than $20,000—some ten times its original cost. A 31. These retroactive obligations were imposed, moreover, upon a small and identifiable number of companies.[12] Thus,

[12]As the trial court wrote, the "targeted group" was a "relatively small group of manufacturers. . . . Installers and distributors were permitted under the regulations to pass on . . . liability in whole to the makers." C 15.

despite its denomination as "legislative" by the Massachusetts court, the proceeding turned on determinations of particularized fact and ended in orders that were "individual in impact and condemnatory in purpose." *Appalachian Power Co.* v. *EPA*, 477 F.2d 495, 501 (CA 4 1973). The decisions of this Court make clear that where a small number of individuals are thus exceptionally affected, they cannot be deprived of their property without an adjudicatory hearing. *See, e.g., Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292, 304-305 (1937); *FCC* v. *WJR, The Goodwill Station*, 337 U.S. 265 (1949); *see also Londoner* v. *Denver*, 210 U.S. 373, 385 (1908).

The impermissibility of denying petitioners an adjudicatory hearing is particularly clear in view of the retroactive nature of the liability imposed on petitioners through the repurchase regulations. As the court construed the state statute, the repurchase obligation arose automatically from the ban. But so read, the statute denies petitioners an adjudication at any time, before or after their property is destroyed.[13] Even if it were arguable that Massachusetts could prospectively ban the sale of UFFI within the State without an adjudicatory hearing, automatically placing onerous and unexpected liabilities on petitioners without a hearing to adjudicate the facts required by statute is a flagrant violation of due process. In sustaining these repurchase procedures, the court disregarded not only the distinction consistently observed in administrative law between legislative-type rules of prospective effect and adjudications that are frequently

[13]These manifestly inadequate procedures will not be cured by the limited hearing provided at the time a consumer requests repurchase of UFFI. That hearing, as noted, is confined to the issue whether the named manufacturer supplied the UFFI whose repurchase is sought. The referee conducting the hearing is not permitted even to consider whether the UFFI has emitted formaldehyde into the house or whether the UFFI has caused or threatened any health effects whatever—precisely the factual issues that required an adjudicatory hearing in this case.

retrospective,[14] but also the admonition of this Court that due process should be more exacting of official actions with retrospective effects. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976).

Unlike the Massachusetts court, the District Court in *Springs Mills, Inc.* v. CPSC, 434 F.Supp. 416 (D.S.C. 1977), correctly applied the principles of this Court's decisions in circumstances very similar to those in this case. The court in that case concluded that the CPSC had acted impermissibly in promulgating a ban of a flame retardant material without an adjudicatory hearing. The court reasoned that the repurchase obligations that flowed from the ban, like those in this case, were among the "most drastic procedures known to law," *id.* at 430, and warranted the safeguards of an adjudicatory hearing fully as much as the property interests at issue in other cases where a hearing has been found necessary. *Id.* at 430, citing *Fuentes* v. *Shevin*, 407 U.S. 67 (1972). The court construed the statute under which the CPSC had acted as requiring an adjudicatory hearing, and so avoided "a finding that Congress had enacted a patently unconstitutional law." *Id.* at 432. The court concluded that any other construction of the statute—one that would deprive persons of "millions of dollars without a hearing, without notice of a hearing, without an opportunity to present evidence, without the opportunity to cross-examine and otherwise test the credibility and validity of evidence presented . . . would be unthinkable." *Id.* at 432-433. The Massachusetts statute in this case, as construed by the State's highest court, likewise cannot be sustained.

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[14]Indeed, the laws of Massachusetts relied on by the court recognize the distinction. MASS. ANN. LAWS ch. 30A, §1 (Law. Co-op. 1983) (defining a regulation as "the whole or any part of every rule, regulation, standard or other requirement of *general application and future effect*. . . .") (emphasis supplied).

B. An Adjudicatory Hearing, with Opportunity for Cross-Examination, Was Essential in View of the Discrete and Individualized Facts on Which the Administrative Action Rested.

Numerous decisions of this Court have established that "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg* v. *Kelly*, 397 U.S. 254, 269 (1970). Nothing in the language or intent of the Fourteenth Amendment exempts administrative action in a commercial context from this elemental principle, as is demonstrated by the numerous decisions of this Court and the courts of appeals following *Londoner* v. *Denver*, 210 U.S. 373, 385 (1908). *See, e.g., Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292, 304-305 (1937); *FCC* v. *WJR, The Goodwill Station*, 337 U.S. 265 (1949); *Illinois* v. *United States*, 666 F.2d 1066 (CA 7 1981); *see also* 1 K. Davis, *Administrative Law Treatise* § 7.02 (1958).

The Massachusetts court disregarded the settled principle that an adjudicatory hearing is required where adverse administrative action turns upon discrete and individualized factual determinations, sometimes characterized as "adjudicative facts." *See United States* v. *Florida East Coast Railway Co.*, 410 U.S. 224, 245 (1973); *Northern California Power Agency* v. *Morton*, 396 F. Supp. 1187 (D.D.C. 1975), *aff'd sub nom. Northern California Power Agency* v. *Kleppe*, 539 F.2d 243 (CA DC 1976); 1 K. Davis, *Administrative Law Treatise*, *supra* at § 7.02.

The administrative proceeding in this case was plainly defined by state statute as concerned with specific narrow and individualized facts. As the trial court observed, "[t]he act mandates that specific findings by the Commissioner be made on the only relevant issue; to wit, the degree of hazard, if any, the [product] presents." C 14-15. The court noted that the factual determination of hazardousness depended in turn upon a number of

facts even more specific to particular manufacturers, including petitioner Borden, Inc., C 15:

> As such the question focuses directly upon the nature and characteristics of the product and its manufacturing formulas, the standards, if any, utilized in its manufacture, storage, handling and shipping, the standards and customs of its distribution, its shelf life, the installation practices and procedures, licensing feasibility, its labeling and warning suitabilities. Therefore, although broad in scope, the scrutiny is narrow in its application, being limited to a particular item and the inquiry to determine and find the facts regarding its degree of hazard, if any, that the article possesses.

Petitioners repeatedly tried in the administrative proceeding to raise such specific questions of fact, but were foreclosed by the informal procedures in this case. *See Budnicki* v. *Beal*, 450 F. Supp. 546, 554-555 (E.D. Pa. 1978).

The informality of the administrative proceedings defeated petitioners' expectation that the statutory preconditions would be rationally decided. The Department relied almost exclusively on unsworn statements of consumers complaining of personal health effects allegedly caused by the product. Without opportunity to confront and cross-examine the complaints made against them, petitioners were unable to establish such critical facts as whether these alleged symptoms had been diagnosed, whether they may have predated the installation of UFFI, and whether they may have been caused by other factors, such as diseases (viruses or bacteria), smoking, or a variety of common household materials. These were questions of quintessential adjudicative fact. It is inconceivable that such issues of causation and threatened injury, where predicating substantial personal liability, would be remitted to casual procedures in cases of tort or nuisance which the proceedings in this case so closely resembled.

Adjudicatory procedures were particularly necessary in this case in view of the complicated and highly speculative scientific evidence that was presented. Petitioners might have been saved

from the Commissioner's arbitrary result had they been allowed the opportunity they were due to confront and cross-examine the witnesses whose theories evidently swayed the Commissioner. *Cf. Mathews* v. *Eldridge*, *supra*, 424 U.S. at 343. As the Ninth Circuit has stated, where "the issue . . . is of a highly complex and technical nature [and] cross-examination will help crystalize the varying contentions of the experts, . . . [f]airness may dictate cross-examination on crucial issues," even though none may be required by statute. *Bunker Hill Co.* v. *EPA*, 572 F.2d 1286, 1305 (CA 9 1977). *See also O'Donnell* v. *Shaffer*, 491 F.2d 59, 62 (CA DC 1974); *Northern California Power Agency* v. *Morton*, *supra*, 396 F. Supp. at 1193.

C. The Denial of Petitioners' Right to an Adjudicatory Hearing Cannot Be Justified by Administrative Convenience.

The Court has stated that in determining whether due process requires an adjucatory hearing, the public interest in avoiding unnecessary administrative and fiscal burdens must be considered. *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 347. In this case no unreasonable burden would have resulted had petitioners been afforded a fair hearing. The trial court found, and the Supreme Judicial Court did not dispute, that as in *Londoner* v. *Denver*, *supra*, the administrative proceeding in this case affected an "easily identifiable and non-diverse" group of persons. C 16. Not only does this fact reinforce the inescapable conclusion that the proceeding was an adjudication of individual and discrete facts, but the small number of manufacturers directly affected suggests strongly that "the fiscal and administrative burdens that the additional or substitute procedural requirement would entail" would not be substantial. *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 335. *See also Mobil Alaska Pipeline Co.* v. *United States*, 557 F.2d 775, 805 (CA 5 1977) (Roney, J., dissenting). In view of the limited number of affected parties, neither the length nor the cost of the Department's proceeding would have been significantly

increased by providing petitioners the opportunity for cross-examination of the allegations against them. Indeed, the trial court expressly found that an adjudicatory proceeding would be readily feasible in the circumstances of this case. C 14-16.

The feasibility of an adjudicatory hearing is further demonstrated by the recent Fifth Circuit decision striking down the Consumer Product Safety Commission's ban on UFFI, and holding that the Commission's failure to conduct a prior adjudicatory hearing was not excused by the Commission's finding that less formal proceedings would be in the public interest. *Gulf South Insulation* v. *CPSC*, 701 F.2d 1137, 1149-1150 (CA 5), *reh'g denied*, No. 82-4218 (June 23, 1983). "The selection of procedures," wrote the court, "is too important to be based on unexplored theories and desires for administrative convenience." *Id.* at 1150. The Department's refusal here to afford petitioners an adjudicatory hearing, likewise motivated by nothing more than administrative convenience, cannot be sustained.

II. The State's Action in Banning UFFI and Ordering Its Repurchase Subjects Petitioners to Irrational and Arbitrary Governmental Action.

The Massachusetts statute as applied by the Commissioner also violates the Fourteenth Amendment because the Commissioner lacked any rational basis for his actions. The Supreme Judicial Court acknowledged the gaping deficiencies in the administrative record, but excused the obvious lack of a rational foundation for the Commissioner's actions by merely concluding that there was a "conceivable" basis for believing that UFFI would "potentially in some conditions" emit formaldehyde at levels affecting the most susceptible people in the population. A 25, 28. Such generalized speculation does not satisfy the due process requirements for banning UFFI and ordering its repurchase.

The ambit of permissible state regulation is concededly quite broad. But "[w]hile the legislative judgment on economic and business matters is well-nigh conclusive . . . it is not beyond judicial inquiry." *Poe* v. *Ullman*, 367 U.S. 497, 518 (1961) (Douglas, J., dissenting). This Court has repeatedly recognized that the "rational-basis standard is 'not a toothless-one,' " *Schweiker* v. *Wilson*, 450 U.S. 221, 234 (1981), quoting *Mathews* v. *Lucas*, 427 U.S. 495, 510 (1976), and under that standard has recently invalidated state action that was patently irrational. *Zobel* v. *Williams*, 457 U.S. 55 (1982); *Logan* v. *Zimmerman Brush Co.*, *supra*, 455 U.S. 422. Exercising such substantive review, albeit limited, is especially appropriate where, as here, the actions alleged to be arbitrary are those of unelected officials not subject to the democratic checks on governmental power that may justify the greater deference owed legislative enactments. *Cf. Motor Vehicle Manufacturers Association* v. *State Farm Mutual Automobile Insurance Co.*, ___ U.S. ___, ___ n.9, 51 U.S.L.W. 4953, 4956 n.9 (June 24, 1983) ("We do not view as equivalent the presumption of constitutionality afforded legislation drafted by Congress and the presumption of regularity afforded an agency in fulfilling its statutory mandate.").

This Court has long recognized that where a person's rights depend upon administrative findings of fact, officials cannot, consistent with the Due Process Clause, capriciously make those findings without some rational foundation. In *ICC* v. *Louisville & Nashville Railroad Co.*, 227 U.S. 88 (1913), the Court considered a challenge to an Interstate Commerce Commission order setting aside the railroad's rates. The Commission was permitted by statute to do so only where it found the rates to be unreasonable. *Id.* at 92. In rejecting the Commission's contention that its finding of unreasonableness was conclusive even if not supported by evidence, the Court stated, *id.* at 91:

> A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer,

> administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.[15]

The Massachusetts statute in this case, like the statute in *Louisville & Nashville Railroad Co.*, *supra*, authorized administrative action only upon findings of certain facts. Because the Commissioner's finding that UFFI was hazardous was not based upon facts that rationally support that conclusion, and because no other basis for his action has been advanced, those actions cannot be sustained. Courts may not defer to such irrational administrative conduct. "[A]n inquiry into the facts before the Commission, in order to ascertain whether its findings are thus vitiated, belongs to the judicial province and does not trench upon, or involve the exercise of, administrative authority." *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266, 277 (1933).[16]

The Massachusetts Supreme Judicial Court in this case failed to give the Commissioner's action even the minimal scrutiny required by the Constitution. As noted, the court conceded that the Commissioner did not determine the amount of formaldehyde contributed by UFFI, or the extent to which UFFI had affected the health of the occupants. A 27. Absolutely no scientific studies

[15] *See also* Southern Railway Co. v. Virginia, 290 U.S. 190, 197 (1933); Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 289 U.S. 266, 277 (1933). *Cf.* Portland Cement Association v. Ruckelshaus, 486 F.2d 375 (CA DC 1973), cert. denied, 417 U.S. 921 (1974).

[16] *See* Gulf South Insulation v. CPSC, 701 F.2d 1137, 1149-50 (CA 5), reh'g denied, No. 82-4218 (June 23, 1983), wherein the Fifth Circuit recognized its obligation to scrutinize the record rather than blindly defer to the CPSC and thereby "abdicate [its] role in the regulatory process." *Id.* at 1150.

were used. C 4, 6, 17. The court nonetheless sustained the Commissioner's actions based on the scant evidence offered in the trial court, none of which was even considered by the Commissioner in promulgating the regulations and none of which could rationally be found to support his actions, even after the fact.

The irrationality of the Commissioner's action in this case is further demonstrated by the Fifth Circuit's recent decision vacating the Consumer Product Safety Commission's ban of UFFI. *Gulf South Insulation* v. *CPSC*, 701 F.2d 1137 (CA 5), *reh'g denied*, No. 82-4218 (June 23, 1983). The CPSC's ban was the result of a six year investigation into UFFI and was based upon a much more extensive record than was developed by the Department in Massachusetts. The Fifth Circuit set aside the ban, as did the trial court here, because the CPSC's finding that the use of UFFI posed an "unreasonable risk" to consumers was not supported by " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " 701 F.2d at 1143, quoting *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229 (1938). The court of appeals noted the agency's "failure to quantify the risk at the exposure level actually associated with UFFI." *Id.* at 1148. The same deficiency exists in this case.

The arbitrariness of the Department's action is all the more egregious because of the onerous retroactive liability to repurchase UFFI that has been imposed. Even if it could be argued that a prospective ban of UFFI could be sustained in this case, placing such a retroactive burden on petitioners cannot. In considering a due process challenge to federal legislation, the Court has said, "[i]t does not follow . . . that what Congress can legislate prospectively it can legislate retrospectively." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976). "The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter

may not suffice for the former." *Id.* at 17.[17] *See also Daughters of Miriam Center for the Aged* v. *Mathews*, 590 F.2d 1250, 1259 (CA 3 1978) ("Retroactive measures—whether promulgated by a legislature or by an administrative agency—have traditionally been subjected to stricter scrutiny than have prospective measures.").

To base a regulation on a claim of health effects from a product, there must be a reasonable basis for concluding that the product causes the health effects, or at least a showing that the health effects occur with more than usual frequency in the presence of the product. There must be a basis for concluding that the alleged offending agent, formaldehyde, was emitted by the product and in quantities sufficient to result in the claimed health effects. There must also be a basis for concluding that the health effects, in this case symptoms characteristic of many common conditions, such as flu, were not the result of other factors in the claimant's medical history, and were more than a mere temporal coincidence. Here, the Department had no factual basis in the record for concluding that any of these circumstances existed, and therefore its action was irrational.[18]

There is, in short, no rational basis for either banning or ordering the repurchase of UFFI. And to excuse such an arbitrary imposition on general grounds of deference to state administrative officials, as the Massachusetts court did here, would leave petitioners completely without the protection of liberty and property that the Constitution secures to every person.

[17] In Turner the Court sustained a statute retroactively imposing on mine operators the obligation to compensate former employees disabled by black-lung disease because it concluded that the law was justified as a rational measure to spread the costs of those disabilities. 428 U.S. at 18. In this case, in contrast, no rational end is served by requiring the repurchase of a product that cannot reasonably be considered hazardous. No health effects were shown to be prevented or remedied by repurchase, and therefore it is not rational to charge petitioners with such unexpected liabilities.

[18] The trial court described the record in this case, itself incomplete, as "a huge gratuitous collection of unsworn written submissions and oral statements and urgings." C 16.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted and the decision of the Massachusetts Supreme Judicial Court reversed.

Respectfully submitted,

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